Reaffirming the Rule of Law in Federal Sentencing

TOM FEENEY

Congressman Tom Feeney represents the 24th District of Florida

In 2000, the FBI searched the home of Aaron Thompson. Over 10,000 images of child pornography were found on his computer's hard drive along with evidence that he distributed over 47,000 images of child pornography that year. Thompson was subsequently arrested. According to the United States Sentencing Guidelines, he should have been sentenced to 87-108 months in prison for possession and distribution of child pornography. A plea agreement was reached with both parties agreeing to an 87-month sentence.

However, the district judge sentenced Thompson to only 44 months in prison. Among his justifications for this significant departure from the guidelines, the judge stated that this large supply of child pornography diverted Thompson's proclivity for sexually abusing minors. But Thompson was charged with possession and distribution of child pornography and not with attempted sexual abuse! Furthermore, this reasoning ignores the fact that the children—whose images are captured for pornographic purposes—are brutally victimized by such exploitation. Fortunately, the Court of Appeals reversed and remanded the case for resentencing.[1] In her concurring opinion, Judge Berzon noted that downward sentencing departures in child pornography cases have become "so frequent as to indicate a pattern that may merit consideration by the Sentencing Guidelines." [2]

Cases in which judges depart down from the United States Sentencing Guidelines for Sexual Exploitation Crimes, such as sexual abuse, child pornography, and kidnapping, have risen steadily over the past five years. Indeed, downward departure rates for all federal crimes have steadily risen since 1997, thus undermining sentencing reform efforts.

A Congressional response was prompted in Spring 2003. In the recently enacted Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (the "PROTECT Act"), Congress overwhelmingly supported my amendment, commonly referred to as the "Feeney Amendment," to limit these downward departures.[3] This essay reviews the development of the United States Sentencing Guidelines and the formation of the United States Sentencing Commission, and indicates how the Feeney Amendment restores uniformity and fairness in federal sentencing.

I. Seeds for Reform: Unfettered Judicial Discretion in Sentencing

Alarmed by the unfettered sentencing discretion given to district judges and widely divergent sentences rendered for similar crimes, Congress passed the Sentencing Reform Act of 1984.[4] This act established the United States Sentencing Commission and authorized the adoption of United States Sentencing Guidelines to structure sentencing decisions. Thus, nationally uniform sentencing practices were achieved.

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[1] *U.S. v. Thompson*, 315 F.3d 1071 (9th Cir. 2002).
[2] *Id.* at 1077.
[3] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650. The Feeney Amendment is found at Title IV – Sentencing Reform.
[4] *Sentencing Reform Act of 1984,* 18 U.S.C. §§ 3551-3626 and 28 U.S.C. §§ 991-998, October 12, 1984, as amended 1985-1988, 1990, 1992, 1994 and 1996.

For over a century prior to these reforms, the federal government had punished criminals through indeterminate sentencing supplemented by parole. Congress had passed statutes prescribing a wide range of penalties for a crime. The district judge held almost unfettered discretion to impose a sentence within that range, and his decision was not subject to appellate review. [5] Certain prisoners were paroled before fully serving the sentence imposed.

This system was based largely on a rehabilitative model of punishment. A judge set the maximum term of imprisonment and the parole commission determined the offender's release date based on the rate of "rehabilitation."[6] The operating assumption was that both the judge and parole commission could ascertain when a prisoner was deemed "rehabilitated." Under this system, the judge and parole commission had broad and unchecked discretion in sentencing, and wide-ranging discrepancies in sentences resulted throughout the nation. Similar criminals with similar histories committing similar crimes received wildly variant sentences. A criminal would receive leniency in one jurisdiction while another was sentenced to the maximum in another jurisdiction or even before the same judge. Here was a pervasive violation of a fundamental tenet of the rule of law: everyone, regardless of his position in life, should be treated equally before the law.

Congress was long concerned about these wide variations. In 1958, it created the Judicial Sentencing Institutes and Joint Councils. These groups formulated sentencing principles and criteria in order to promote an equitable administration of criminal laws across federal jurisdictions.[7] However, this system was voluntary and widely observed in the breach.

By the 1970s, criminal justice scholars and judicial reformers agonized about unpredictable and dissimilar federal sentences. Research concluded that the federal system imposed widely divergent sentences for similar crimes. For instance, according to the Senate Report on the Comprehensive Crime Control Act of 1985, in 1974 the average federal sentence for bank robbery was 11 years, but only 5½ years in the Northern District of Illinois.[8] Even more troubling was the fact that these discrepancies often were affected by a defendant's race, gender, and socioeconomic status.[9]

Numerous reformers agitated for change. The National Commission on Reform of Federal Criminal Laws spent nearly a decade advocating reform. Among legal scholars, Harold R. Tyler and Dean Norval Morris of the University of Chicago Law School championed reform along with United States District Judge Marvin Frankel and Harvard Professor Alan Dershowitz. The seed for a legislative solution germinated at a dinner party in 1975 hosted by Senator Edward Kennedy with noted guests Frankel and Dershowitz. Thereafter, Senator Kennedy began pushing for a legislative solution.

In 1984, this effort culminated in the Sentencing Reform Act, introduced by Senator Kennedy and backed by a bipartisan coalition that included Senators John McClellan, Roman Hruska, Strom Thurmond, and Joseph Biden. A desire for equity and greater national uniformity drove liberal support. Conservatives were attracted by the rejection of the rehabilitative model in favor of a system in which the sentence served matched the sentence imposed. As Judge Frankel reflected on the Sentencing Reform Act nearly twenty years after its inception:

> The genesis of the commission and guidelines was a basic aversion to placing arbitrary power in the hands of any officials, including judges. In the supposed service of individualization and rehabilitation, the law in that old regime gave sweeping, essentially unreviewable power to the judges to decide—each in his or

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[5] See *Mistretta v. U.S.*, 488 U.S. 361 at 363 (1989).
[6] S. Rep. 98-225, 1984 U.S.C.C.A.N. 3182 at 3223.
[7] *Mistretta,* 488 U.S. at 365.
[8] S. Rep. 98-225, 1984 U.S.C.C.A.N. 3182 at 3224.
[9] Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines,* 76 Notre Dame L. Rev. 21 at 26 (2000).

> her unregulated discretion—whether any particular bank robber should be put on probation or locked up for twenty-five, fifty, or more years. In that setting, though many of us chose not to see this for nearly a century, it was no surprise that any defendant's sentence depended on the judge who happened to have the case. Ample evidence demonstrated this. Every prosecutor and defense lawyer knew it. For a remarkably long time, however, we all sat still while the grim business of sentencing reflected every day the antithesis of the rule of law. [10]

II. Bringing the Rule of Law to Sentencing

The Sentencing Reform Act abolished unwarranted sentencing disparity among offenders with similar characteristics convicted of similar conduct while retaining judicial flexibility to address unusual situations. The innovations were:

- Structured judicial discretion through national sentencing guidelines
- Departures from these guidelines needed to be supported by reasons stated in the record and subject to appellate review
- Determinate or “real time” sentencing
- Abolition of parole

Sentencing decisions were partially removed from individual judges and vested in the United States Sentencing Commission. This agency was located in the Judicial Branch and comprised seven members appointed by the President with the advice and consent of the Senate. At least three members were federal judges. The Sentencing Commission’s principal purpose was to "establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes."[11] The Sentencing Commission must prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons. The Sentencing Commission must also continually "review and revise" these guidelines and make recommendations to Congress on needed modifications.[12]

The Sentencing Commission created and periodically updates a Sentencing Table that a district judge uses in determining the appropriate sentence. The characteristics of the crime are summarized in an “Offense Level.” The offender’s characteristics are calculated into a “Criminal History.” The intersection of these characteristics produces a sentencing range. The judge sentences the defendant within the range unless a departure is warranted by a factor not taken into consideration by the Sentencing Commission. [13] A portion of the Sentencing Table follows:

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[10] Marvin E. Frankel and Leonard Orland, *A Conversation about Sentencing Commissions and Guidelines,* 64 U. Colo. L. Rev. 655 at 655 (1993).
[11] United States Sentencing Commission, Guidelines Manual, Ch. 1, Pt. A (Nov. 2002).
[12] *Mistretta,* 488 U.S. at 369.
[13] See John M. Walker, Jr., *Loosening the Administrative Handcuffs: Discretion and Responsibility under the Guidelines,* 59 Brook. L. Rev. 551 at 555-56 (1993).

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24

Note that the district judge retains unrestricted discretion to select a sentence within the guidelines. So an offender possessing an offense level of 8 and a criminal history of II can receive a sentence ranging from 4-10 months.

Congress recognized the need for judicial discretion within the Sentencing Guidelines and also allowed for departures from the Sentencing Guidelines in certain "rare occurrences." Judges are permitted to depart from the guidelines if there exists "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[14] As explained in the Sentencing Guidelines Manual issued by the Sentencing Commission, each guideline carves out a "heartland"—a set of typical cases "embodying the conduct that each guideline describes." "When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted."[15]

Such departures are supposed to be rare. The Sentencing Guidelines Manual states: "The Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice."[16] The Sentencing Reform Act, coupled with the detailed Sentencing Guidelines Manual, makes the point that the Sentencing Guidelines are comprehensive enough for judges to render the appropriate sentence for most cases.[17] If a court exercises its discretion to depart from the Guidelines, it must disclose for the record the specific reasons for that departure and why the Sentencing Guidelines did not adequately take into account the pertinent circumstances of that particular case. That decision, furthermore, is subject to appellate review.

Congress made the Sentencing Guidelines mandatory and rejected amendments creating a voluntary approach. Federal and state experiments with voluntary guideline systems had been completely ineffective. Judges simply did not follow voluntary guidelines.[18]

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[14] 18 U.S.C. § 3553(b).
[15] United States Sentencing Commission, Guidelines Manual, Ch.1 Pt. A (Nov. 2002) <http://www.ussc.gov/GUIDELIN.HTM>(10/07/03).
[16] *Id.*
[17] Berman, 76 Notre Dame L. Rev. at 47.
[18] S. Rep. 98-225, 1984 U.S.C.C.A.N. 3182 at 3264 (citing Senate testimony of Scott Harshbarger, District Attorney for Middlesex County, MA).

Finally, Congress rejected imprisonment as a means of promoting rehabilitation, instead stating that punishment should serve retributive, educational, deterrent, and incapacitative goals.[19] Thus, parole was abolished to ensure that time served equaled time sentenced.

III. Mistretta: Affirming the Constitutionality of the 1984 Reforms

The Sentencing Reform Act took effect on November 1, 1987. Critics challenged the constitutionality of the Sentencing Commission and the resulting sentencing scheme. Historically, federal sentencing was never assigned as an exclusive duty of one of the three branches of government. Article III Section I of the U.S. Constitution established only the Supreme Court and gave Congress the authority to "ordain and establish" the inferior federal courts. As Professor John Harrison observed:

> Congress enjoys substantial power over the jurisdiction of the federal courts. Its authority over the inferior federal courts is, considered in itself, as plenary as the commerce power. Congress may give them all the jurisdiction the Constitution permits, or none at all, or anything in between as far as Article III is concerned. Other constitutional limitations, when applicable, restrict that power as they may restrict any power of Congress. As for the Supreme Court, Congress may not add to or subtract from its original jurisdiction, although it may, within the limits of Article III, create concurrent jurisdiction in the inferior federal courts.[20]

Does this mean Congress has unfettered power over the Article III "inferior" courts? At first glance, the answer would be yes. However, constitutional limits exist such as prohibiting Bills of Attainder or suspension of the Writ of Habeas Corpus, along with the Fifth Amendment due process clause. And of course, Congress cannot grant federal courts jurisdiction over a matter but then require cases be decided in disregard of the Constitution or otherwise dictate the case's outcome.[21]

Was the creation of the Sentencing Commission an excessive delegation of congressional authority? Did this locating of the Sentencing Commission in the judicial branch violate the separation of powers principle? The Supreme Court settled these questions in *Mistretta v. United States.*[22] The Court found that Congress neither delegated excessive legislative power to the Sentencing Commission nor violated separation of powers. Congress is solely and expressly empowered to establish the federal judiciary (other than the Supreme Court) and to define its jurisdiction. Furthermore, Congress has unquestioned authority to establish and control any sentencing scheme:

> Congress, of course, has the power to fix the sentence for a federal crime and the scope of judicial discretion with respect to a sentence is subject to congressional control.[23]

Critics of the Sentencing Guidelines and the Feeney Amendment conveniently overlook such constitutional authority. The Constitution nowhere grants courts unlimited sentencing discretion. Along with all actors in our republican form of government, the judiciary remains subject to checks

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[19] *Mistretta,* 488 U.S. at 367.
[20] John Harrison, *"The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III,"* 64 U. Chi. L. Rev. 203 at 209 (1997).
[21] Gerald Gunter, *"Congressional Power to Curtail Federal Court Jurisdiction,"* 36 Stan. L. Rev. 895 at 910 (1984).
[22] 488 U.S. 361 (1989).
[23] *Mistretta,* 488 U.S. at 650-51 (citations omitted).

and balances – a system that eschews granting any government official unlimited power and discretion.

IV. Koon: A Green Light for Increased Downward Departures

After *Mistretta*, implementation of the Sentencing Guidelines ruffled the feathers of some judges and criminal defense attorneys. Comfortable with exercising unchecked power, some district judges found the Sentencing Guidelines too restrictive. Defense attorneys also complained since their powers of persuasion—their stock in trade—ran aground upon immovable guidelines demanding uniform treatment of offenders. Jurisdictions differed on what circumstances constituted the "heartland," that is, the set of typical cases that structured the guidelines.[24] Complaints about the "rigidity" of the Sentencing Guidelines led some sentencing judges to exploit opportunities for downward departures, imposing sentences lower than those required by the Sentencing Table.

What justified downward departures, and what was the standard for appellate review of such departures? The Supreme Court answered these questions in 1996 in *Koon v. United States.*[25] Defendants were the police officers in the infamous Rodney King case. The district court had departed by eight levels from the specified sentence in the Sentencing Guidelines and had given the police officers a much lighter sentence. After appeal, the Ninth Circuit Court of Appeals reviewed the sentencing judge's departure decision using a "de novo" standard of review and reversed. The Supreme Court granted certiorari to "determine the correct standard of review for appeals from a district court's decision to depart from the Guidelines."[26]

Koon made two significant changes to federal sentencing practices. First, appellate courts were to apply an abuse of discretion standard of review instead of the de novo standard commonly used by all circuit courts.[27] Under de novo review, the appellate court does not have to substantially defer to the sentencing court's exercise of discretion. Rather, it may substitute its own judgment on whether a departure is justified. The abuse of discretion standard requires that the appellate court grant substantial deference to the sentencing court's discretion.

Second, *Koon* set forth the framework a sentencing court should use when deciding whether to depart from the Sentencing Guidelines. When addressing that question, a judge should ask:

> 1. Is the departure forbidden by the Sentencing Commission?
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> 2. Has the Sentencing Commission forbidden departures based on those features?
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> 3. If not, has the Sentencing Commission encouraged departures based on those features?
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> 4. If not, has the Sentencing Commission discouraged departures based on those features?[28]

Koon broadened judicial discretion in departures. Previously, the spirit of the Sentencing Reform Act and the Sentencing Guidelines dictated that sentencing departures were to be relatively rare. *Koon* underscored the available justifications for downward departures and restricted judicial review of such departures, thus effectively expanding the use of built-in safety valves. However, *Koon* was based on the Supreme Court's interpretation of relevant statutes and Sentencing

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[24] Berman, 76 Notre Dame L. Rev. at 61.
[25] 518 U.S. 81 (1996).
[26] See *Koon* 518 U.S. at 91.
[27] Berman, 76 Notre Dame L. Rev. at 52, 75.
[28] *Koon* at 518 U.S. at 95.

Commission guidelines and not on constitutional grounds. Therefore Congress and the Sentencing Commission could overturn any or all of *Koon's* holdings.

Koon seemed to listen to the legal and academic complaints about the restrictive Sentencing Guidelines and the need for more judicial discretion. Indeed, Federal District Judge Patti Saris heralded *Koon* :

> Before the *Koon* decision, the general perception in district courts—according to my own experience and that of numerous commentators—was that departures were disapproved deviations from the standard and would be subjected to tough scrutiny on appeal. The *Koon* decision has made clear that district court assessments of a defendant should be granted some deference and that a district court is uniquely situated to determine whether a case is typical or instead contains a factor or combination of factors that take it outside the "heartland." With this green light, I believe that district courts will begin departing more often from the stated guidelines range where a judge believes that permissible considerations are present, and that these departures will be upheld. [29]

Some judges saw that "green light" as departure rates began climbing. The rate for downward departures for reasons other than providing substantial assistance to federal prosecutors shot from 12.1 percent of all sentences rendered in fiscal year 1997 to 18.3 percent in fiscal year 2001—a 51 percent increase.

Furthermore, departures based on vague grounds increased. In fiscal year 2001, sentencing judges provided 11,044 reasons for 9,768 cases involving downward departures other than for providing substantial assistance to federal prosecutors. 22.6 percent (2,503) of those reasons involved catchall phrases such as:

- General mitigating circumstances
- Not representative of the heartland
- Adequate to meet purposes of sentencing
- Sufficient punishment

Even more disturbing, downward departure rates for sexual exploitation cases rose dramatically. The average downward departure rate for such cases was 19.6 percent between the fiscal years of 1996 and 2001 (excluding cases involving substantial assistance to federal prosecutors and Southwest border cases). For pornography and prostitution cases (including the sexual exploitation of minors and transporting minors for prostitution or sex) the departure rate was 21.0 percent. For kidnapping and hostage-taking cases the departure rate was 12.3 percent. Downward departure rates for child pornography possession cases have ranged between 20 and 29 percent nationwide.

Congress and the Department of Justice became increasingly alarmed at the growing downward departure rate—particularly since departures were decreed to be "rare occurrences" (an 18.3 percent rate is not rare). In 2000, Senator Thurmond held hearings on the increasing rate of departures. In June 2002, the Senate Subcommittee on Crime and Drugs chaired by Senator Biden held a hearing on penalties for white-collar crimes. James B. Comey, U.S. Attorney for the Southern District of New York, testified about substantial downward departure rates for well-

[29] Patti B. Saris, *"Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective"* 30 Suffolk U. L. Rev. 1027 at 1040-41 (1997).

heeled white-collar defendants especially on the grounds of "aberrant behavior" and "extraordinary restitution."[30]

In October 2002, the House Subcommittee on Crime, Terrorism, and Homeland Security held hearings on child protection legislation and the rate of downward departures in child pornography and child pornography possession cases. Associate Deputy Attorney General Daniel Collins testified about the Department of Justice's recommended statutory changes to boost penalties on various child victim and sex abuse crimes and to ban downward departures in child victim and child sex crime cases. [31]

V. The Feeney Amendment: Reaffirming the 1984 Sentencing Reforms

In 2003, Congressman Jim Sensenbrenner, Chairman of the House Judiciary Committee, introduced legislation that evolved into the PROTECT Act. This Act introduced a national "Amber Alert" system to aid in finding missing children, and increased penalties for crimes against children, including sexual exploitation and other abuses, transportation for illegal sexual activity, and child kidnapping.

I introduced an amendment to this bill to address the heightened rate of downward departures. Most notably, it established a "de novo" standard of appellate review, thereby restoring the pre-*Koon* practice. This amendment also restricted the reasons for justifying downward departures for all crimes to those specifically approved by the Sentencing Commission. It passed the House of Representatives by a vote of 357 to 58. The Senate companion bill contained no sentencing reform language. The conference committee revised the House version of my amendment—the revision now commonly known as the Feeney Amendment—and included it in the PROTECT Act, which then passed the Senate and House of Representatives by 98-0 and 400-25 votes, respectively.

For all crimes, the Feeney Amendment relies on the interplay of four mechanisms to manage and reduce the rate of downward sentencing departures:

1. Heightened appellate review;

2. An aggressive appellate strategy by the Attorney General;

3. Improved information reporting on sentencing decisions; and

4. Sentencing Commission tightening of departure loopholes.

For crimes involving the sexual exploitation of children, child pornography, child kidnapping, or sexual abuse ("Sexual Exploitation Crimes"), the Feeney Amendment further restricts downward departures by placing explicit limits on the permissible grounds for downward departures. For this class of crimes, Congress has unambiguously directed that downward sentencing departures should be—as the Sentencing Guidelines mandate—"extremely rare."

Reducing Overall Downward Departure Rates

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[30] Testimony of James B. Comey before the Subcommittee on Crime and Drugs of the Senate Judiciary Committee, June 19, 2002 <http://judiciary.senate.gov/print_testimony.cfm?id=280&wit_id=650>

[31] Testimony of Daniel P. Collins before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, October 1, 2002, found in <http://www.house.gov/judiciary/81981.PDF>

It is to be hoped that the interplay of these Feeney Amendment mechanisms will achieve Congress's mandated goal of reducing downward departures while retaining court discretion to handle judiciously the few cases that deviate from the norm. These reforms check the tendency of some courts to use *Koon* as an excuse to backslide into the pre-reform regime of unfettered discretion. Good faith efforts by all parties can achieve this mandate. Otherwise, Congress will undoubtedly revisit this issue and may exercise its power to issue specific proscriptions—as done with Sexual Exploitation Crimes—to strip away permitted reasons for sentencing departures.

(1) Heightened Appellate Review

De Novo Review of Critical Elements. Koon involved the statutory interpretation of 18 U.S.C. §3742, which governs the appeal of sentences that depart from the applicable guideline range. Accordingly, the Feeney Amendment revisited that statute by (1) structuring the grounds to be reviewed by the Court of Appeals and (2) altering the appellate standards of review.

The following table illustrates the type of structured review to be accomplished by the appellate court.

Pre-Feeney Appellate Review	***Post-Feeney Appellate Review***
Appellate court examines whether the departure is "unreasonable" based on the: (1) statutory factors to be considered in imposing a sentence and (2) factors stated by the District Court during sentencing.	Appellate court reviews each factor used by sentencing court to justify the departure and determines: (1) does the factor advance the broad sentencing goals of the Sentencing Guidelines (18 U.S.C. §3553(a)(2))?, (2) is it authorized by the Sentencing Guidelines (18 U.S.C. §3553(b))?, and (3) is it justified by the facts?
	Appellate court determines whether the sentence departs by "an unreasonable degree" from the guideline range

The Feeney Amendment also revised appellate standards of review.

Issues for Review	***Pre-Feeney Appellate Standard***	***Post-Feeney Appellate Standard***
Determination of Historical Facts	Clear Error	Clear Error
Authorized Ground for Downward Departure	Abuse of Discretion	De Novo
Downward Departure Warranted by the Facts	Abuse of Discretion	De Novo
Degree of Departure	Abuse of Discretion	Abuse of Discretion

Some of these changes will not have a significant impact on current appellate practice. Advancing the broad sentencing goals of 18 U.S.C. §3553(a)(2) is readily met in most cases. As noted in *Koon*, "so long as the overall sentence is sufficient, but not greater than necessary, to comply with [section 3553(a)(2)] goals, the statute is satisfied."[32] Also, except in egregious cases,

[32] *Koon,* 518 U.S. at 108.

retention of the abuse of discretion standard for reviewing the degree of departure from the guideline range results in appellate affirmation of most downward departures.

The Feeney Amendment's de novo review standard provides the greatest tool for reducing downward departure rates. As to whether a departure ground is authorized, such review may initially provide subtle changes in appellate decisions. Except for Sexual Exploitation Crimes, the Sentencing Guidelines still adhere to the standard that unless a ground is expressly prohibited, it may—depending on a case's facts and circumstances—be authorized. As currently written, the Sentencing Guidelines place "essentially no limit on the number of potential factors that may warrant departure."[33] As *Koon* held:

> We conclude, then, that a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no—as it will be most of the time—the sentencing court must determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline.[34]

Over time, though, this de novo review could significantly check downward departures. First, sentencing courts will be dissuaded from using conclusive or catchall reasons to justify a departure that provide no insight into the sentencing court's reasoning. Proper review and oversight of the sentencing system requires care, attention, and recorded explanation in justifying a downward departure.

Second, as I will explain in a moment, the Sentencing Commission has been instructed to review the Sentencing Guidelines for the purpose of reducing the downward departure rate. As language is revised on the authorized grounds for such departures, subsequent de novo review will create case law affirming the rarity of downward departures. De novo review of whether a downward departure is warranted represents the most significant check on downward departures. Here, the Court of Appeals owes no deference to the sentencing court's reasoning and will be guided by a broader circuit perspective on sentencing practices along with precedent from other circuits. Thus, greater uniformity will be achieved as appellate courts smooth out the sentencing outliers presented by particular districts or judges.

Sentencing Upon Remand. The Feeney Amendment prohibits the isolated but still disturbing practice of a sentencing judge—after reversal and remand on a downward departure—reimposing the same reduced sentence using new grounds and facts. Thus, the Feeney Amendment imposes a "one bite of the apple standard." The record and reasons for downward departures are established and frozen at initial sentencing. If reversed on appeal, the resentencing is limited to that record and reasoning absent the factors found impermissible by the appellate court.

(2) Report by the Attorney General

The Judicial Branch—the courts and Sentencing Commission—are not the sole players involved in sentencing departures. U.S. Attorneys prosecute every case. They, along with the Solicitor General, must demonstrate an aggressive appellate strategy toward unwarranted sentencing departures. In fiscal year 2001, U.S. Attorneys appealed only 94 grounds for downward departure despite being faced with 10,013 cases of downward departures for reasons other than substantial assistance to federal prosecutors. More rigorous appellate review standards will not reduce downward departure rates unless the Department of Justice increases this astonishingly low appellate rate.

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[33] *Burns v. United States,* 501 U.S. 129, 136-137 (1991).
[34] *Koon,* 518 U.S. at 1098.

Accordingly, the Feeney Amendment required the Attorney General to provide Congress with a plan for monitoring downward departures and implementing an appellate strategy utilizing the heightened appellate review of downward departures. On July 28, 2003, Attorney General Ashcroft issued related policies and procedures to all federal prosecutors.

(3) Improved Information and Accountability about Downward Departures

In order to fully assess performance of the federal sentencing scheme, sentencing courts must provide timely and complete information about individual sentencing decisions, including downward departures. Thus, the Feeney Amendment ensures disclosure of the most public of judicial matters—the sentencing of convicted criminals.

The Chief Judge of each District Court must submit to the Sentencing Commission a written report on each sentence that includes reasons for imposing the sentence and any downward departure, plea agreements, presentencing report, and written order of judgment and commitment. The Sentencing Commission must, upon request, provide such information to appropriate congressional committees. The Sentencing Commission must also provide an annual analysis of these sentencing decisions including identification of districts not submitting the required documentation—a disturbing phenomenon practiced by a few districts.

Also the Sentencing Commission must, upon request, provide any data files compiling individual sentencing reports to the Attorney General. This disclosed information includes the name of the sentencing judge. Such information helps ensure that federal judges are properly accountable for their sentencing decisions comporting with the law.

(4) Directive to Sentencing Commission

The Feeney Amendment specifically directs the Sentencing Commission to take affirmative steps to reduce substantially the incidence of downward departures through reviewing and amending the sentencing guidelines, policy statements, and official commentary. Thus, Congress has specifically enunciated the goal of reducing downward departures while allowing the Sentencing Commission to use its expertise to identify and target problem areas. Again, this action is in lieu of direct Congressional amendment of the sentencing guidelines and relies on the commitment of all parties to resolve this problem. On June 24, 2003, the Sentencing Commission solicited public comment on implementing these steps. In order to hold the line on sentencing departures, the Feeney Amendment imposes a two-year moratorium on the Sentencing Commission's promulgation of any new grounds for downward departures.

Curbing Departures in Sexual Exploitation Crimes

The above mechanisms are designed to reduce the incidence of downward departures for all crimes, including Sexual Exploitation Crimes. But because of the severe nature of the latter crimes and the disturbing tendency of "white-collar" defendants to receive downward departures, the Feeney Amendment specifically prohibited several previously acceptable grounds for downward departures for Sexual Exploitation Crimes. Thus, District Courts should find it exceedingly difficult to depart from the sentencing guidelines in these cases.

In order to depart from the guidelines, the sentencing court must use grounds that the Sentencing Commission has affirmatively and specifically identified as permissible within a discrete section (Chapter 5, Part K) of the sentencing guidelines. Thus, District Courts no longer have discretion to invent other grounds. Rather, they must strictly follow the Sentencing Commission's identification of grounds and related interpretations. Furthermore, several of these Chapter 5, Part K grounds were specifically made unavailable to perpetrators of Sexual Exploitation Crimes. These now forbidden grounds are: family ties and responsibilities, community ties, gambling dependence or abuse, diminished capacity, and aberrant behavior.

This specification and limitation of downward departure grounds substantially changes current policy. As noted above, the pre-Feeney Amendment sentencing structure stated that unless proscribed, any ground could be acceptable for justifying a downward departure. Now, for Sexual Exploitation Crimes, the standard is that unless they are explicitly acknowledged by the Sentencing Guidelines, all grounds for downward departure are proscribed. If downward departure rates are not significantly reduced, Congress could apply this model to all federal crimes.

VI. Rededicating Our Commitment to the Rule of Law

In a not too distant past, Americans lived daily lives of relative security. Homes were not adorned with security systems or burglar bars. Keys were left in the ignitions of parked cars. Children freely roamed and explored neighborhoods without fear of abduction or exploitation. And not that many years ago, Americans were treated differently under the law depending on where they lived or the courtroom in which they appeared.

Beginning in the 1960s, American society underwent change -- some for better and some for worse. Appeals to the national conscience resulted in our collective rededication to the rule of law -- a determination that similarly situated people would be treated the same by governmental authorities. That made America a better place. But rising crime rates made America a worse place, especially for those Americans who could not buy security by retreating to gated communities, hiring private security, or sending their children to private schools.

In 1984, the political forces unleashed by these societal forces culminated in the Sentencing Reform Act. The resulting Sentencing Guidelines ensured that offenders would be treated equally before the law regardless of their socioeconomic standing, their geographic location, or the bias of the judge sentencing them. Furthermore, the rehabilitative model for punishment was firmly rejected. Instead, those preying on law-abiding citizens would pay real consequences for their actions.

After the 1987 implementation of the Sentencing Guidelines, the federal criminal system witnessed greater uniformity of sentencing, including the assurance that “white-collar” offenders served time in prison. Violating federal criminal law began carrying real consequences. In the 1986-1997 period, average sentences for federal offenses rose from 39 months to 54 months. Time to be served increased from 23 to 75 months for weapons offenders, from 30 to 66 months for drug offenders, and from 74 to 83 months for bank robbery offenders.

In 2002, Americans experienced the lowest overall rate of violent victimization and property crime since inception of the National Crime Victimization Survey in 1973. Many factors contributed to this increased personal security. Undoubtedly, one factor was the sentencing reforms implemented on the federal level and mirrored in many states.

Those enamored of the pre-reform days -- either the use of unfettered judicial discretion or the imposition of lenient or rehabilitative sentences -- have consistently misused the Sentencing Reform Act’s safety valves. Designed to handle unusual cases, these tools have instead been deployed to erode gradually the reform sentencing scheme—as testified by steadily increasing departure rates since *Koon’s* “green light.”

In adopting the Feeney Amendment by overwhelming margins, Congress has exercised its constitutional authority to control the sentencing of federal offenders. Again, good faith efforts can achieve the Feeney Amendment’s desired effects so Congress does not have to take additional corrective action: And legitimate arguments can be made that some guidelines are too harsh. However those debates are best held in the popularly elected Congress. But America is not going to return to the days of unfettered power resting in the hands of a single district judge. And law-

abiding citizens will not return to the days of living in fear and being prisoners in their homes and communities.